UNITED MALAYAN BANKING CORPORATION BHD

v.

RICHLAND TRADE & DEVELOPMENT SDN BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
[CIVIL APPEAL NO: P-02-158-1994]
27 JUNE 1995

COMPANY LAW: *Winding-up - Statutory notice - Failure to quantify outstanding sum - Whether notice defective - Whether principles in bankruptcy cases applicable - Companies Act 1965, s. 218(2)(a) - Bankruptcy Act 1967, s. 3(1)(i)*

COMPANY LAW: *Winding-up - Petition - Validity of service - Change of address - Notice to registrar of companies - Entry of change delayed - When notice deemed effective - Companies Act 1965, s. 120 - Companies (Winding-up) Rules 1972, r. 25*

CIVIL PROCEDURE: *Appeal - Appeal to Court of Appeal - Winding-up - Setting-aside - Validity of statutory notice and service of petition - Application of principles in bankruptcy case - Whether judge erred in law - Companies Act 1965, ss. 120, 128(2)(a) - Companies (Winding-up) Rules 1972, r. 25 - Bankruptcy Act 1967, s. 3(1)(i)*

The petitioner appealed against the decision of the High Court which set aside a winding-up order in default of appearance against the respondent. The learned judge, relying on the decision of the Supreme Court in *Fawzia Osman v. Bank Bumiputra Malaysia Berhad and Anor Appeal*, a bankruptcy case, held that the statutory notice under s. 218 of the Companies Act 1965 was defective as the petitioner had failed to quantify the exact amount owed by the respondent in the said notice.

Question also arose as to whether the service of the winding-up petition on 26 February 1992 to the respondent's old registered address was irregular. The petitioner submitted that an official search conducted on 29 January 1992 revealed the old address of the respondent whereas the respondent said it had lodged its notice of change of address with the registrar of companies on 1 February 1992.

Held:
Per Shaik Daud Ismail JCA

[1] The learned judge ought not to apply principles enunciated in bankruptcy cases in winding-up cases as they are governed by entirely different Acts and regulations. While it cannot be gainsaid that the winding-up of a company has certain obvious affinities with the bankruptcy of an individual the courts should be careful not to stretch these affinities to such an extent that they lose sight of the fact that they may fall in danger of applying the law of bankruptcy to company winding-up proceedings.

[2] It must be remembered that in winding-up proceedings there is nothing corresponding to an act of bankruptcy. The demand stipulated in the Companies Act 1965 is merely a warning that if there is no payment within three weeks, a winding-up petition would follow. Therefore, the demand need not exactly quantify the amount unlike a bankruptcy notice.

[3] The learned judge erred in applying the principle enunciated in *Fawzia*'s case to the present case.

[4] In *Summit Company (M) Sdn Bhd v. Nokko Products (M) Sdn Bhd* the Federal Court held that the effective date of the change of the registered address is the date of the lodgement of the notice to the registrar of companies. Therefore, the court is bound by that decision and service of the petition on the old address on 26 February 1992 must be bad in law.

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Pempetisyen merayu terhadap keputusan Mahkamah Tinggi yang mengenepikan perintah pengulungan kerana ketidakadilan oleh penentang hakim yang bijaksana bersandarkan kepada keputusan Mahkamah Agung *Fawzia bt Osman v. Bank Bumiputra Malaysia Berhad & Anor,* kes kebankrapan yang memutuskan bahawa notis "statutory" di bawah s. 218 Akta Syarikat 1965 adalah cacat kerana pempetisyen gagal untuk mengemukakan dengan jelas jumlah yang terhutang oleh penentang di dalam notis tersebut.

Persoalan juga timbul mengenai serahan notis petisyen pergulungan pada 26 Februari 1992 kepada penentang di alamat yang lama adalah tidak sah. Pempetisyen berhujah bahawa carian resmi yang dibuat pada 29 Januari 1992 menunjukkan penentang menggunakan alamat yang lama sebaliknya penentang menyatakan bahawa ia telah memberikan notis penukaran alamatnya kepada pendaftar syarikat pada 1 Februari 1992.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Hakim yang bijaksana tidak sepatutnya bersandarkan kepada prinsip yang dikemukakan di dalam kes kebangkrapan di dalam kes pergulungan syarikat kerana kedua-duanya berlandaskan kepada Akta dan peraturan yang berbeza. Ia tidak boleh menyatakan bahawa dalam kes pergulungan syarikat terdapat persamaan dengan kes kebangkrapan seorang individu. Mahkamah harus berhati-hati dan tidak boleh menggunapakai undang-undang kebangkrapan di dalam kes pergulungan syarikat.

[2] Perlu diingat bahawa di dalam tindakan pergulungan syarikat ianya tidak sama dengan kes kebangkrapan. Tuntutan yang dinyatakan di dalam Akta Syarikat 1965 hanyalah satu amaran kepada penghutang bahawa sekiranya selepas tiga minggu ia gagal untuk membayar, petisyen pergulungan syarikat akan dimulakan. Oleh yang demikian, tuntutan tidak perlu dinyatakan dengan tepat sepertimana dalam notis kebangkrapan.

[3] Hakim yang bijaksana terkhilaf dalam menggunakan prinsip yang digunakan dalam kes *Fawzia* dalam kes ini.

[4] Dalam kes *Summit Company (M) Sdn Bhd v. Nokko Products (M) Sdn Bhd*, Mahkamah Agung memutuskan bahawa tarikh yang berkesan bagi pertukaran alamat berdaftar adalah pada tarikh ianya dilapurkan melalui notis kepada pendaftar syarikat. Oleh yang demikian, mahkamah terikat kepada keputusan bahawa penyampaian petisyen ke alamat lama pada 26 Februari 1992 adalah salah di segi undang-undang.

[Rayuan ditolak dengan kos.]

Case(s) referred to:

Bateman Television Ltd & Anor v. Coleridge Finance Co Ltd [1969] NZLR 794 ***(refd)***

Fawzia Osman v. Bank Bumiputra Malaysia Bhd & Another Appeal [1991] 1 CLJ 652 ***(dist)***

Lim Boon Peng v. United Orient Leasing Co [1991] 1 CLJ 445 ***(dist)***

Low Mun v. Chung Khiaw Bank Ltd [1987] 2 CLJ 400 ***(dist)***

PT Pelajaran Nasional Indonesia v. Joo Seang & Co Ltd [1958] 24 MLJ 113 ***(foll)***
Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1991] 3 CLJ 2078 ***(foll)***
Summit Company (M) Sdn Bhd v. Nokko Products (M) Sdn Bhd [1985] 1 CLJ 70 ***(foll)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i)
Companies Act 1965, ss. 120, 218(2)(a)
Companies (Winding-up) Rules 1972, r. 25
Rules of the Court of Appeal 1994, r. 5

For the appellant - Asbir Kaur; M/s Asbir, Hira Singh & Co
For the respondent - Teja Singh; M/s Teja Singh Penesar & Co

[Editor's note: The petitioner's appeal to the Federal Court was allowed; see United Malayan Banking Corporation Bhd v. Richland Trade & Development Sdn Bhd [2000] 1 CLJ 57. The Federal Court held that the service was valid in light of new evidence that was brought before the court and was confident that the Court of Appeal would have arrived at the same conclusion if they had sight of that new evidence.]

Reported by Cindy Chan

JUDGMENT

Shaik Daud Ismail JCA:

This is an appeal from the decision of the Penang High Court whereby a winding-up order made in default of appearance against the respondent company was ordered to be set aside pursuant to an application by the respondent. The winding-up order was set aside solely on the ground that the statutory notice under s. 218 of the Companies Act 1965 was held to be defective. The learned judge at first instance held that the sum required to be paid in the notice issued by the petitioner dated 25 October 1991 was ambiguous and uncertain as the petitioner had failed to quantify it. He was of the view that the statutory notice under s. 218 dated 25 October 1991 contained what he described as "the offending words" ie, "interest of $64.69 per day from 26 October 1991 till date of full settlement."

He came to the conclusion that the above phrase in the notice was ambiguous and uncertain as the petitioner has not quantified the exact amount due from the respondent. On reading through the grounds of judgment of the learned judge it seems quite clear that the learned judge solely relied and followed the decision in the then Supreme Court case of *Fawzia bt Osman v. Bank Bumiputra Malaysia Berhad and Another Appeal* [1991] 1 CLJ 652. In delivering the decision of the court, YA Mohamed

Azmi SCJ referred to two other cases, namely, *Low Mun v. Chung Khiaw Bank Ltd* [1987] 2 CLJ 400 and *Lim Boon Peng v. United Orient Leasing Co* [1991] 1 CLJ 445; and following both decisions said at p. 654:

> Since the debtor is entitled to know exactly the actual sum that he has to pay to avoid the commission of the act of bankruptcy, it is essential that the notice must quantify the total sum required to be paid for the purpose of that particular bankruptcy notice. In these appeals, by leaving the amount at large "to date of actual realisation" there is uncertainty in the actual amount due and payable which is required to be settled by the notice within seven days of service.

and further on in the same page said:

> All sums demanded to be paid should be capable of being made the subject of execution, which meant that the amount required to be paid in the notice must not only be due and payable at the date of the issue of the notice but also that the execution thereon had not been stayed. Thus, it is wrong to include in the notice any sum which is not yet due and payable by the debtor as at the date of the issue of the notice.

The learned judge in the present case came to the conclusion that the same principle adopted in *Fawzia*'s and the other two cases should be equally applicable to the present case. Now in going through the above three cited cases it can be seen immediately that all the three cases were cases involving bankruptcy proceedings under the Bankruptcy Act 1967 and the Bankruptcy Rules 1969. The present case however, is a case of winding-up of a company under the Companies Act 1965.

With respect, I am of the view that the learned judge ought not to apply principles enunciated in bankruptcy cases, in cases of winding-up. Bankruptcy cases are governed by their own Act and company winding-up cases are governed by an entirely different set of Act and regulations. While it cannot be gainsaid that the liquidation or winding-up of a company has certain obvious affinities with the bankruptcy of an individual the courts should be careful not to stretch these affinities to such an extent that they lose sight of the fact that they may fall in danger of applying the law of bankruptcy to company winding-up proceedings. It must be remembered that in a winding-up proceeding there is nothing corresponding to an act of bankruptcy. In my view it is because of this aspect of this act of bankruptcy that the courts adopt a strict view in construing a bankruptcy notice. As a result of the Supreme Court decision in the *Fawzia*'s case, s. 3(1)(i) of the Bankruptcy Act 1967 was amended by Act A827 with effect from 16 July 1992 to include the phrase "with interest quantified up to the date of issue of the bankruptcy notice." With this amendment the ambiguity and uncertainty earlier encountered by creditors came to an end.

In the case of the liquidation of winding-up of a company, s. 218(2)(a) of the Companies Act 1965 provides that:

(2) A company shall be deemed to be unable to pay its debts if:

(a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office **a demand** under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) ...;

(c) ... (emphasis added.)

The demand stipulated in the sub-s. (2)(a) above is commonly called a statutory notice or demand. It can be seen, therefore, that this section refers to a "demand" unlike s. 3(1)(i) of the Bankruptcy Act 1967 which specifically mentions the words "bankruptcy notice". It is my view that the demand stipulated in the Companies Act 1965 is merely a warning to the creditor that if after three weeks he fails to pay, a winding-up petition would follow. Therefore the demand need not exactly quantify the amount unlike in the bankruptcy notice. Unlike a bankruptcy notice there is no prescribed form of the statutory demand or notice as the whole object of the demand is to warn the debtor of an impending petition. See *Bateman Television Ltd & Anor v. Coleridge Finance Co Ltd* [1969] NZLR 794 at 803. The failure to quantify does not render the demand of its real purport and objective. The provisions of s. 218(2)(a) prescribe a simple method by which a creditor, to whom the company owes more than five hundred ringgit, can establish that the company is unable to pay its debts. In order for the demand to be effective, however, it must comply strictly with certain requirements as stipulated in the sub-section itself. The requirements are that the demand must be in writing under the hand of the creditor or his authorised agent, it must specify the sum due (no mention is made of quantifying it to the last cent). The demand must be served on the company by leaving it at the registered office. If these requirements are met, I am of the view that the demand is valid and if after three weeks the company fails to pay the amount demanded then the law deems it to be unable to pay its debts whereupon a winding-up petition would follow.

In the Bankruptcy Act 1967, however, as for the sum due it is provided "to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date

of issue of the bankruptcy notice." Now in the light of these wordings it is encumbent upon the creditor to quantify the exact amount. In the case of the demand under the Companies Act 1965, what is provided is simply "is indebted in a sum exceeding five hundred ringgit then due". In the light of these differences between the provisions in the Bankruptcy Act and the Companies Act I am of the view that the principles of law enunciated in one ought not to be applied to the other.

An authority closer to the facts of the present case and involving a company winding-up was cited but found no favour with the learned judge. The case referred to is the *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1991] 3 CLJ 2078. In that case an appeal against an order of winding-up of the appellant company was dismissed by the Supreme Court on a similar notice under s. 218 of the Companies Act 1965 using similar expressions as in the present case. The learned judge was of the view that he ought not to follow that decision because it is distinguishable in that the issue of ambiguity and uncertainty of the statutory demand was not decided by the Supreme Court. With respect, I disagree. Not every issue in an appeal need be specifically decided before it could be followed. It could well be that the court found there was no ambiguity or uncertainty and therefore there was no need to make a specific decision on the issue. Be that as it may I am of the view that the *Sri Hartamas* case falls squarely on the facts of this case and therefore it would be more appropriate to follow it than the *Fawzia*'s case.

In the circumstances of the present case I hold that the learned judge erred in applying the principle enunciated in the *Fawzia*'s case to the present case. Be that as it may, learned counsel for the respondent raised one more issue which unfortunately he failed to raise in the lower court. Learned counsel for the appellant objected to this but I find no merits to the objection. By virtue of r. 5 of the Rules of the Court of Appeal 1994 an appeal to this court shall be by way of re-hearing. Therefore this court is competent to consider this new issue. It is contended by learned counsel for the respondent that the service of the winding-up petition on his client was irregular. He refers to r. 25 of the Companies (Winding-up) Rules 1972 where it is specifically provided that every petition to wind-up a company shall be served upon the company at the registered office of the company by leaving a copy with any member, officer, or servant of the company there or if no such member, officer or servant can be found by leaving a copy at the registered office or principal place of business. The law has therefore provided a specific mode of service and this mode has to be adopted failing which service shall not be deemed to have been effected. In *PT Pelajaran Nasional Indonesia v. Joo Seang & Co Ltd* [1958] 24 MLJ

113, the issue in dispute was the service of a writ on a company. Rigby J held that where the law provides a particular method or form of procedure for effecting service then those procedures must be strictly complied with and the courts would set aside a judgment obtained by default where the requirements have not been complied with. In that case the court found that the writ had not been served on the company at its registered office as required by the law and service was held to be bad and the judgment in default was set aside.

In the present case there is no dispute that the petition was served at 48 Rangoon Road, Penang on a Chinese person found thereat. According to the affidavit of one Chow Yen Kong the manager of S & C Management Services Sdn Bhd dated 4 July 1994, who had been the secretaries for the respondent company since June 1985, the company had moved out of the old registered address at 48 Rangoon Road, Penang in late April 1991 to its new address at 731 Dato Keramat Road, Penang, and the notice of this change dated 31 December 1991 was lodged with the registrar of companies on 1 February 1992. In the light of this it is contended that the service of the petition on 26 February 1992 at the respondent's old registered address was bad in law. No affidavit was filed to contradict this.

In reply to this learned counsel for the appellant submits that an official search was made on 29 January 1992 and the registered address of the respondent was at 48 Rangoon Road and hence service was affected at that address. Therefore the service was good. In response to this learned counsel for the respondent refers the court to the case of *Summit Company (M) Sdn Bhd v. Nokko Products (M) Sdn Bhd* [1985] 1 CLJ 70. In that case the appellant purported to serve a writ on 1 July 1982 on the respondent company at an address, which they believed to be the registered address of the company. The respondent company had in fact changed its registered address and the change had been notified to the registrar of companies on 20 February 1982. The notification of change was not, however, entered into the register until 24 September 1992. When no appearance was entered to the writ the appellants obtained judgment-in-default and execution proceedings were taken. The respondents when they came to know of the writ subsequently applied to have the writ set aside. The High Court gave judgment for the respondent. On appeal the then Federal Court held that the effective date of the change of the registered address is the date of the lodgement of the notice to the registrar of companies, and the court held that the learned judge was correct in holding that there had been no service of the writ and set aside the judgment.

The facts of the *Summit* case is similar to the present case The notice of change was lodged with the registrar of companies on 1 February 1992 and service of the petition was on 26 February 1992 at the old address. There was no affidavit filed on behalf of the appellant to contradict the date of the judgment. Therefore following the decision in the *Summit* case, and this court is bound by that decision, service of the petition on the old address on 26 February 1992 must be bad in law. The fact that the particulars of the change had not been entered in the register is no concern of the respondent and is irrelevant. Once the notice of change under s. 120 of the Companies Act 1965 had been lodged this should be the effective date even though the notification of the change is entered in the register much later. In the circumstances of this case I hold that the service of the petition on the respondent company is bad in law. For this reason which reason was never considered by the learned judge and for the earlier reasons pertaining to the statutory demand I would dismiss the appeal with costs. Deposit to go towards taxed costs.